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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

**No. 93**

PUBLIC SERVICE ELECTRIC AND GAS COMPANY,
*Petitioner,*

*v.*

FEDERAL POWER COMMISSION, TRANSCONTINENTAL GAS PIPE LINE CORPORATION AND TEXACO, INC.,
*Respondents.*

## REPLY BRIEF FOR PETITIONER IN SUPPORT OF PETITION

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FEDERAL POWER COMMISSION,
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TEXACO, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## REPLY BRIEF FOR PETITIONER IN SUPPORT OF PETITION

Petitioner's reasons on which it bases its request that certiorari be granted have been stated fully in its Petition. However, there are two issues on which the Respondent, the Federal Power Commission, contends certiorari should

be denied, and on which Petitioner believes further clarification would not be repetitious.

## 1. The Issue of Jurisdiction based on Commingling.

The Respondent, the Federal Power Commission, suggests that this Court deny certiorari with respect to this issue mainly because it contends that there is no "sale" in the field. This disregards the fact that Texaco receives gas by way of sale from other producers at its Paradis Gasoline Plant and delivers this gas to Transco. It also disregards the obvious sale which takes place in the field when Texaco purchases the interest that Royalty Owners have in the gas produced by Texaco and delivered to Transco. Further, it disregards the fact that in law the "exchange" of gas is itself a sale. More important, however, is the complete inconsistency in the Commission's reasoning. It contends before this Court that jurisdiction does not lie because there is "no sale in the field". Yet, in the *Florida Gas Transmission Company* case where there was an *undisputed* sale in the field, the Commission refused to assert its jurisdiction under the Natural Gas Act and specifically held that it did *not have jurisdiction.*[1] How then can the Commission reasonably contend that the absence of a "sale in the field" is the determinative factor which caused it to deny jurisdiction. Likewise, the fact that Texaco would *itself* use natural gas in approximately the same volumes that it delivered to Transco and which Transco would deliver to it in New Jersey, cannot seriously be considered an important non-jurisdictional factor because in the *Florida Gas* case, the Commission refused to accept jurisdiction where a *non-producer third party* purchased gas in Louisiana to be used to generate electricity in Florida.

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[1] *Florida Gas Transmission Company,* Docket No. CP65-393 decided March 1, 1967, ——— F. P. C. ———.

It is clear that the important issue of the boundaries of the Commission's jurisdiction cannot be relegated to a case by case decisional basis. The conflicting holdings of the Commission itself point to the serious need for a decision by this Court for the protection of consumers and the guidance of the industry itself.

As we have noted, the Commission in a line of cases commencing with *Connecticut Light and Power Company* and continuing through *Oklahoma Natural, Shell Oil, Colton, Rayne Field, Lo Vaca, Amerada, Sayre Field,* and *Louisiana Public Service Commission*, consistently asserted jurisdiction and, where challenged, was upheld on appeal.[2] In the instant case and the *Florida Gas* case the Commission has completely reversed its position and now seems determined to take a non-jurisdictional course.[3] This may be in the public interest. Petitioner, of course, is not charged with the obligation to resolve that issue. However, Petitioner and other utilities and industrial companies are entitled to know the ground rules governing jurisdiction. If the transportation of a producer's gas (acquired in part by production and in part through a sale), commingled with jurisdictional gas, for use by the producer in another state is to be held a non-jurisdictional transaction, such a regula-

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[2] *Connecticut Light and Power Company* v. *F. P. C.*, 324 U. S. 515 (1945), *Oklahoma Natural Gas Company*, 23 F. P. C. 291 (1960), *Shell Oil Company* 25 F. P. C. 1316 (1961), *F. P. C.* v. *Southern California Edison Company*, 376 U. S. 205 (1964), *United Gas Improvement Company* v. *Continental Oil Company*, 381 U. S. 392 (1965), *California* v. *Lo Vaca Gathering Company*, 379 U. S. 366 (1965), *F. P. C.* v. *Amerada Petroleum Corp.*, 379 U. S. 687 (1965), *Natural Gas Pipeline Co. of America*, 34 F. P. C. 1258 (1965), *Louisiana Public Service Commission* v. *F. P. C.*, 359 F. 2d 525 (1966).

[3] *Florida Gas Transmission Company*, Docket No. CP65-393, March 1, 1967——— F. P. C.———.

tory gap should not be determined by a denial of certiorari but only after this issue, of such general importance, has been briefed and argued by all parties concerned.

## 2. The Issue of the Denial of Fair Administrative Procedure.

The Respondent, the Federal Power Commission, minimizes this issue by merely referring to it in a footnote on the last page of its Brief. It characterizes the Hearing Examiner's procedure as the taking of official notice to which Petitioner did not object. This is an attempt to gloss over prejudicial error. Actually, strenuous objection to this procedure was timely made on Exceptions to the Commission and on Motion for Rehearing (see R. 238-248, 290, 295). It was also briefed and argued to the Court below.

So that it may be clear to the Court that this error should not be condoned and subsequently used as a precedent which would destroy the value of administrative hearings generally, Petitioner considers it appropriate to detail the facts as briefly as possible.

The Examiner noted that "As one of the main bases asserted for approval of its application Transco states that the proposal herein for interruptible service would utilize idle capacity and thereby aid it in operating its system at the highest possible load factor. * * *" (R. 192).

The Examiner further stated:

> "* * * The Examiner has *used certain exhibits attached to the application* in Docket No. CP64-96 as the basis for the following findings: (1) that upon the completion of the facilities now authorized by the Commission's order dated April 17, 1964, in Docket No. CP64-96, there will be annual unused firm contract

> capacity in Zone 3 sufficient to serve the 1965 estimated interruptible transportation proposed for Texaco; and (2) that Transco's load factor will be be improved. * * *" (R. 194) (Emphasis Supplied)

The Examiner recognized that in order to reach a determination that there would be sufficient unused capacity he would have to know:

1. The maximum daily contract deliveries;
2. the estimated annual deliveries to each consumer; and
3. the calculated average annual operating efficiency factor of the pipeline.

The second factor, estimated annual deliveries, was not supplied for the record by Transco. Therefore, the Examiner took the estimated annual deliveries from an exhibit attached to the application in Docket No. CP64-96. This entirely separate docket was uncontested, hence these estimated annual deliveries were never proven by a witness and no opportunity to test the validity of these estimates was afforded to Petitioner or to anyone else.[4] The maximum daily delivery figures (first factor) were in evidence in the instant docket (CP63-222) and thus there was no

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[4] It should be noted that in using these estimated annual deliveries he did not include all of them because he completely ignored the total volume of A. C. Q. (Annual Contract Quantity) gas which Transco is obligated to deliver annually to certain customers. If he had included this large volume of gas, the result of his calcuations would show that no unused capacity was available. Thus, his error was clearly prejudicial. If a witness had done this, he would have been subject to cross-examination and rebuttal. However, as this was done by the Examiner in his decisional process, no cross-examination or rebuttal was possible. Petitioner's only remedy was by way of Exception to the Decision. Respondents' charge that Petitioner made no objection is patently in error.

need for the Examiner to take official notice with respect to them. However, they were not the *same* as those in Docket No. CP64-96, so he discarded the figures of record and used the figures in Docket No. CP64-96 to determine the maximum daily deliveries. The efficiency factor of the pipeline was not contained in this record nor was it contained in Docket No. CP64-96. Thus, the Examiner made an assumption as to what he thought the efficiency factor might be.

This procedure of the Examiner in using allegations contained in exhibits attached to the application in another separate docket cannot be justified on the ground that it was merely the taking of official notice of a material fact of common knowledge. The statements contained in an application in another docket have no more evidentiary weight than allegations contained in a Complaint at Law. An application is a mere pleading and the only fact it is evidence of, is the fact that it was filed and contains the statements set forth therein.

The procedure used herein by the Examiner was clearly condemned by this Court in the *Catco* case (*Atlantic Refining Co.* v. *Public Service Commission, et al.*, 360 U. S. 378, 393), where it was held that conclusory findings cannot be made by the Commission where there is no record support.

The Commission in its two opinions ignored this issue. The Court below did not, in its opinion, discuss this prejudicial procedural error. This procedure by the Hearing Examiner involving technical calculations to arrive at pipeline capacity volumes can by no fair-minded standard be termed appropriate use of the Doctrine of Official Notice of a *material fact*. It resulted in a denial of due process of such a prejudicial nature as to require a rehearing.

## CONCLUSION

Petitioner contends that the issues contained in this case are all of such importance and have such a broad impact on the public interest as to justify granting the Writ of Certiorari herein.

**It is respectfully submitted that the Petition for a Writ of Certiorari should be granted.**

Respectfully submitted,

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Dated: July 18, 1967